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No. 99-731

In the Supreme Court of the United States

SHAMMARA RICHARDS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLES A. RICHARDS, JR., AND AS GUARDIAN AND NEXT OF KIN OF SHANEE A. RICHARDS AND CHARLES RICHARDS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF AMICI CURIAE SUPPORTING PETITIONER

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Brief of Amici Curiae
Bonnie A. O'Neill and Edmund J. O'Neill
In Support of Certiorari

Bonnie A. O'Neill and Edmund J. O'Neill submit this brief as *amici curiae* in support of the Petition for Certiorari in this case.[1] Both petitioner and respondent have consented in writing to the filing of this brief.

Interest of the Amici

Bonnie and Edmund O'Neill are the parents of Kerryn O'Neill, an officer in the United States Navy who was murdered as she sat in her apartment watching television with a friend. The circumstances of her death are set out in *O'Neill v. United States,* 140 F.3d 564 fn.** (3d Cir. 1998)(Statement of Becker, C.J., joined by Sloviter and McKee, JJ., Sur Denial of Rehearing) as follows:

> O'Neill, a Naval officer, was murdered by her former fiancé, Ensign George Smith. O'Neill met Smith at the United States Naval Academy where they both attended school. After graduation O'Neill was assigned to a naval base in San Diego. Coincidentally, Smith was sent to the same base several months later in preparation for a tour of duty on a submarine. Shortly after Smith's arrival in San Diego, O'Neill broke off their engagement and he began to stalk her. One night while O'Neill was sitting in her on-base apartment watching a movie with a friend, Smith came to her building, shot and killed her and her companion and then killed himself.

[1] Statement pursuant to this Court's Rule 37.6. No counsel for a party wrote this brief in whole or part. No person or entity other than the amici or their counsel has made any monetary contribution to preparation or submission of this brief.

> Smith had been given a battery of psychological tests to determine his psychological fitness for submarine duty. On this "Subscreen" test he had scored four standard deviations above normal levels (in the 99.99 percentile) for aggressive/ destructive behavior. He had also scored more than two standard deviations above normal levels in six other categories — including impulsive and manipulative behavior. Under Naval procedures, these results should have been forwarded to the Department of Psychiatry at the Naval Hospital for a full psychological evaluation. O'Neill's family, with considerable force, urges that the Navy was negligent in failing to follow-up on these extreme test results.

The O'Neills sued the United States under the Federal Tort Claims Act for damages resulting from the death of their daughter. Their case was dismissed pursuant to the doctrine of *Feres v. United States*, 340 U.S. 135 (1950), and the dismissal was affirmed by the Third Circuit, which also denied rehearing en banc, although Chief Judge Becker and Judges Sloviter and McKee dissented from that denial and "urge[d] the Supreme court to grant *certiorari* and reconsider *Feres*." *Id.*, 140 F.3d at 566. However, this Court denied certiorari. 119 S. Ct. 404 (1998).

Despite their loss in litigation, the *amici* remain concerned at the negative effect of the *Feres* doctrine on other service members and their families where service members are injured or killed by the negligence of employees of the military. They believe that they should use the knowledge and experience they gained in their own unsuccessful litigation in the attempt to assist others in seeking to overturn the *Feres* doctrine.

A History of *Feres* and its Changing Rationales

In 1946 Congress passed the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680, to allow suits in tort against the government based on the negligent acts or

omissions of its employees. As enacted, the FTCA permits the government to be sued for peacetime injury to members of the military. *Id.* at § 2671. The statute specifically excepts from its coverage claims for injuries "arising out of *the combatant activities* of the military or naval forces, or the Coast Guard, *during time of war*." 28 U.S.C. § 2680(j) (emphasis added). Relying on this plain language, in *Brooks v. United States*, 337 U.S. 49 (1949), the Court confirmed that an active-duty servicemember may sue the government under the FTCA for injuries caused by the negligence of members of the armed forces where the injuries did not arise out of the injured servicemember's military service. There, the Court permitted recovery to two servicemembers for injuries and death as a result of their car's collision with an Army truck.

One year later, in *Feres v. United States*, 340 U.S. 135, the Court created a broad exception to the government's general liability under the FTCA where the servicemember's injury arises out of or is "in the course of activity incident to service." *Id.* at 146. The Court distinguished *Brooks* by pointing out that while the plaintiffs there were in the military and the injury was caused by the military, their injury did not arise out of their military service. *Id.* In *Feres*, the Court was presented with two cases involving alleged medical malpractice by Army doctors and one involving a defective heat plant that allegedly caused a fire in a barracks. The Court posited three rationales for its holding. First, the Court stated that the FTCA permits suits against the government only "in the same manner and to the same extent as a private individual under like circumstances", 28 U.S.C. § 2674, and there is no "parallel" private liability for injuries caused by the military, which is a uniquely governmental function. 340 U.S. at 141-42. Second, Congress could not have intended variable local tort law to govern the "distinctively federal relationship" between the government and its servicemembers. *Id.* at 142-44. Third, Congress also could not have intended to permit servicemembers to bring FTCA

suits where "simple, certain, and uniform" veterans' benefits are available for the same injuries. *Id.* at 144-45.

Soon after *Feres* was decided the Court departed from the original justifications for its holding. The Court first advanced a new policy rationale for *Feres*, namely that Congress could not have intended the federal courts to entertain FTCA suits brought by servicemembers where to do so would undermine military discipline. *United States v. Brown*, 348 U.S. 110, 112 (1954). The Court then abandoned the first rationale for *Feres* – the only one that purported to be based on the text of the FTCA – by rejecting the original "parallel" private liability ground. Thus, in *Indian Towing Co. v. United States*, 350 U.S. 61, 64-65 (1955), and *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957), the Court allowed recovery for negligent activities (Coast Guard operation of a lighthouse and Forest Service firefighting) that were uniquely governmental.

Over succeeding years, the Court has not been able to identify a statutory basis or a consistent rationale for the *Feres* doctrine, and the rationales said to underlie the doctrine have continued to shift. The original notion that it would be unfair to the plaintiff (but apparently not to the government) to allow a servicemember's recovery to turn on variable local tort law later evolved into a concern about the military's need for uniformity in its affairs. *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 672 (1977). The Court then abandoned, as "no longer controlling", the original considerations of variable local law and the availability of veterans' benefits. *United States v. Shearer*, 473 U.S. 52, 58 n.4 (1985). But a mere two years later the Court revived these same justifications in support of its holding in *United States v. Johnson*, 481 U.S. 681, 689-90 (1987). Moreover, the Court had also said that *Feres* is "best explained" by the need to prevent intrusion into sensitive military decision-making and discipline. *Shearer*, 473 U.S. at 57 (quoting *United States v. Muniz*, 374 U.S. 150, 162 (1963)). But the Court has since permitted suits by civilians that question the

soundness of military judgments, create the same risk of non-uniformity of rules applying to the military, and intrude into the same issues of military discipline. *Sheridan v. United States*, 487 U.S. 392 (1988). In short, after nearly fifty years the *Feres* doctrine is a series of decisions in search of a rationale.

ARGUMENT

The continued existence of the *Feres* doctrine raises a number of important issues concerning the underpinnings of the doctrine with which this Court has not dealt. Because *Feres* is a decision of this Court, the lower courts do not have the power to question or re-examine the support for, and the rationale of, the decision (although a large number of circuit court judges have criticized the Rule. Pet. 20 ff.). But as the Petition ably demonstrates, the courts of appeals vary greatly in their understanding and interpretation of the *Feres* doctrine. It is the submission of the *amici* that this confusion cannot be eliminated unless this Court grants certiorari and re-examines the fundamentals of the *Feres* doctrine.

1. Because the Feres Doctrine no longer has any foundation in the text of the Federal Tort Claims Act, this Court should examine whether the doctrine has any appropriate foundation.

In *Feres* itself, the Court advanced a rationale based on the text of the Federal Tort Claims Act. It held that the FTCA permits suits against the government only "in the same manner and to the same extent as a private individual under like circumstances", 28 U.S.C. § 2674, and there is no "parallel" private liability for injuries caused by the military, which is a uniquely governmental function. 340 U.S. at 141-42. However, soon after *Feres* was decided the Court abandoned that statutory rationale for the holding – the only one that purported to be based on the text of the FTCA – by rejecting the "parallel" private liability ground. *United States v. Muniz*, 374 U.S. 150, 159 (1963). *See Indian Towing Co.*

v. United States, 350 U.S. 61, 64-65 (1955) and *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957), where the Court allowed recovery for negligent activities (Coast Guard operation of a lighthouse and Forest Service firefighting) that were uniquely governmental.

Accordingly, it does not appear that there is now any basis for the *Feres* doctrine in the text of the Federal Tort Claims Act. While the Court has not directly addressed the issue, in the dissenting opinion in *United States v. Johnson*, 481 U.S. 681, 694-95 (1987), Justice Scalia, joined by Justices Brennan, Marshall, and Stevens, demonstrated that point in a discussion to which the opinion of the Court does not respond. Moreover, in *Saudi Arabia v. Nelson*, 507 U.S. 349, 374 (1993), Justice Kennedy, concurring and dissenting in part, distinguished cases decided under the *Feres* doctrine by pointing out that *Feres* is not a statutory doctrine but one of federal common law.[2] Nor does the United States assert to the contrary in *Feres* cases. Even though the O'Neills argued the lack of any statutory text to support *Feres* in their petition for certiorari (October Term 1998, No. 98-194, at pp.11-12), the United States did not claim otherwise in its Brief in Opposition.

Therefore, the *Feres* doctrine lacks statutory support and appears to be a judicially created limitation on a Congressionally created right to sue. But this Court has repeatedly held that it is "bound to respect th[e] choice[s]" of Congress in drafting statutes; and the Court "[is] not to

[2] Whether the doctrine constituted a proper use for judge-made federal common law Justice Kennedy was not called upon to decide. It is quite clear, however, that it is not. In *Northwest Air Lines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981) this Court held that apart from standard interpretation of constitutional and statutory provisions, the Court may fashion federal common law only "in the absence of legislation, . . . subject to the paramount authority of Congress" (internal quotation omitted). As we note below, this Court has long held that it lacks the power to alter the effect of a statute of Congress.

rewrite the statute based on [its] notions of appropriate policy." *BankAmerica Corp v. United States*, 462 U.S. 122, 140 (1983). Indeed, this Court emphasized that very point in construing the Federal Tort Claims Act itself in *Rayonier v. United States*, 352 U.S. at 320 ("There is no justification for this Court to read exemptions into the Act beyond those provided by Congress"). Although this Court has found a number of policies, which have shifted back and forth over time, that it has held support the *Feres* doctrine (*see* pp. 2-4, *supra*), the fact is that the Court lacks power to condition or limit a statutory provision like the Federal Tort Claims Act on policy grounds, regardless of how wise the Court may think its version of the policy is. *See Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 557-58 (1978). For this reason the Court should grant certiorari to identify the source, if any, of the continued vitality of the *Feres* doctrine. *See also, e.g., Brogan v. United States*, 118 S. Ct. 805, 811-12 (1998).

2. The Separation of Powers doctrine further advises against continuation of *Feres*.

Because the *Feres* doctrine is not based upon any statute of Congress and is a judge-made limitation on a statutory right to sue, it also constitutes a reach by this Court into other areas reserved to Congress by the Constitution. While to support *Feres* the Court places great weight on the supposed negative impact of tort liability on military relationships and discipline (*Shearer*, 473 U.S. at 57-58), it is to Congress, and not the Court, that the Constitution gives the authority "[t]o make rules for the Government and Regulation of the land and naval forces." As the Court has recognized, Congress has the Constitutional authority to determine the "rights, duties, and responsibilities" of the military, "including regulations, procedures, and remedies related to military discipline." *Chappell v. Wallace*, 462 U.S. 296, 301 (1983). The Court's concern that in the Federal Tort Claims

Act the Congress has not sufficiently accounted for those matters is thus out of place.

The Court further owes special deference to Congress's judgment regarding the scope of its waiver of sovereign immunity in the Federal Tort Claims Act. Only Congress can determine whether and to what extent the sovereign immunity of the United States may be waived. *United States v. Nordic Village Inc.*, 503 U.S. 30, 33-34 (1992). The Court lacks the power "to narrow the waiver that Congress intended," *United States v. Kubrick*, 444 U.S. 111, 118 (1979), or to "import immunity back into a statute designed to limit it." *Indian Towing*, 350 U.S. at 69.

It therefore appears that in maintaining the nonstatutory *Feres* doctrine as a limitation on the right to sue that goes beyond the restrictions set by Congress in the Federal Tort Claims Act, the Court is intruding on the Constitutional prerogatives of Congress both to determine how to govern and regulate the nation's military forces and to define the federal government's waiver of sovereign immunity. The Court should address these issues.

3. The Court has not examined the text of the Act for the substantial assistance that it would provide in assessing the correctness of the *Feres* doctrine.

With the Court's abandonment of the "parallel private liability" ground as a statutory basis for the *Feres* doctrine, the Court should have, but has not, reassessed the text of the Tort Claims Act for guidance. The text shows the Congress carefully considered and dealt with the issues that the Court appears to believe that Congress overlooked.

a. The statute's text shows that Congress considered and dealt with the issues that have concerned the Court in the *Feres* doctrine, although Congress dealt with those issues in a different way. First, the Act explicitly excepts suits claiming liability for "combatant activities . . .

during time of war" (§ 2680(j)) and activities in a foreign country § 2680 (k)). Thus Congress considered special issues pertaining to the military and carefully delineated limitations on liability that it deemed appropriate. Second, Congress created exemptions from liability for certain intentional torts and for suits arising out of "exercise or performance or the failure to exercise or perform a discretionary function . . . whether or not the discretion involved be abused." The "discretionary function" exception, the Court has held, insulates the government from the risk of tort liability for the actions of government officials who have discretionary responsibility, *i.e.*, situations where government employees "necessarily [take] calculated risks, but those risks [are] encountered for the advancement of a governmental purpose . . . ." *United States v. Varig Airlines,* 467 U.S. 797, 820 (1984). It is difficult to understand how the "complex, subtle and professional decisions as to . . . control of a military force" – which this Court held in *Shearer,* 473 U.S. at 57-58, that it is the primary purpose of the *Feres* doctrine to shield from judicial intrusion – are not already shielded by Congress in the statutory discretionary function exemption.

In short, this Court has never examined the language of the Act to determine what portions of the *Feres* doctrine, if any, are not already achieved by a realistic reading of the Act. Indeed, for the almost fifty years since *Feres* was decided, the existence of the doctrine has served to "crowd out" the development of caselaw that would otherwise have applied these exemptions and other statutory limitations on liability, to cases involving military matters.

b. *Feres*'s incoherence is due, in part, to the fact that in that decision the Court speculated repeatedly about what Congress could *not* have intended by the FTCA. *See Johnson*, 481 U.S. at 695 (Scalia, J., with whom Brennan, Marshall, and Stevens, JJ., joined, dissenting). But such one-way speculation does not give the sympathetic reading that a statute of Congress deserves. In fact the Court has ignored the very substantial considerations that were likely on

Congress's mind in allowing suits by service members and their families for peacetime injuries and death.[3] For example, Congress may have recognized that the sacrifice that a service member makes for this country every day of his or her service warrants the protection and compensation the FTCA provides, in spite of some impact on military discipline. Congress may have been concerned that not providing the same protections and benefits to service members as were to be provided to civilians would negatively impact recruitment and morale in the armed services. Congress may have thought that the potential for duplicative recovery (i.e. veteran's benefits and tort recovery) would be resolved through a damages calculation. *See, e.g., Johnson v. United States*, 704 F.2d 1431, 1441 n.6 (9th Cir. 1983) (veterans' benefits deducted from servicemember's FTCA award). As for the families of the victims of peacetime injuries, Congress may have considered, and refused to accept, the injustice of providing no relief at all that is the result of the decision below.

Finally, it is clear that the courts of appeals are in conflict and they and the district courts need guidance as to the substance, scope, and rationale of the *Feres* doctrine. This is well documented in the Petition, at 11-18. However, it is perhaps not out of place to add that a *ratio decidendi* is in serious need of attention if it is thought by a United States Court of Appeals to turn upon the insubstantial fact that the federal government owns the ground under a public highway where an automobile accident occurred, with Kentucky having an easement to maintain and patrol that highway, as opposed to that State owning the land in fee. Yet that is the view that the Third Circuit took of the present case. Pet. App. 2a, 6a-7a. That a court of appeals could be diverted by such trivial points merely underscores how far at sea this Court has

[3] Congress is not required to enunciate its concerns in legislative history in order to have them appreciated by the courts. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980).

left the lower courts as to the substance and rationale of, and the source of the Court's power to propound, the *Feres* doctrine.

CONCLUSION

The Court should grant certiorari, overturn the *Feres* doctrine, and hold that the text of the Federal Tort Claims Act alone governs tort claims brought against the United States by members of its military forces.

Respectfully submitted

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